No. 183.

Brf. of Clarke, J. Kenney, Mac Henderson for P.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 5, 1901.

No. 183.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ALONZO C. CROOM, AS COMPTROLLER OF THE STATE OF FLORIDA, AND JOHN A. PEARCE, AS SHERIFF OF LEON COUNTY.

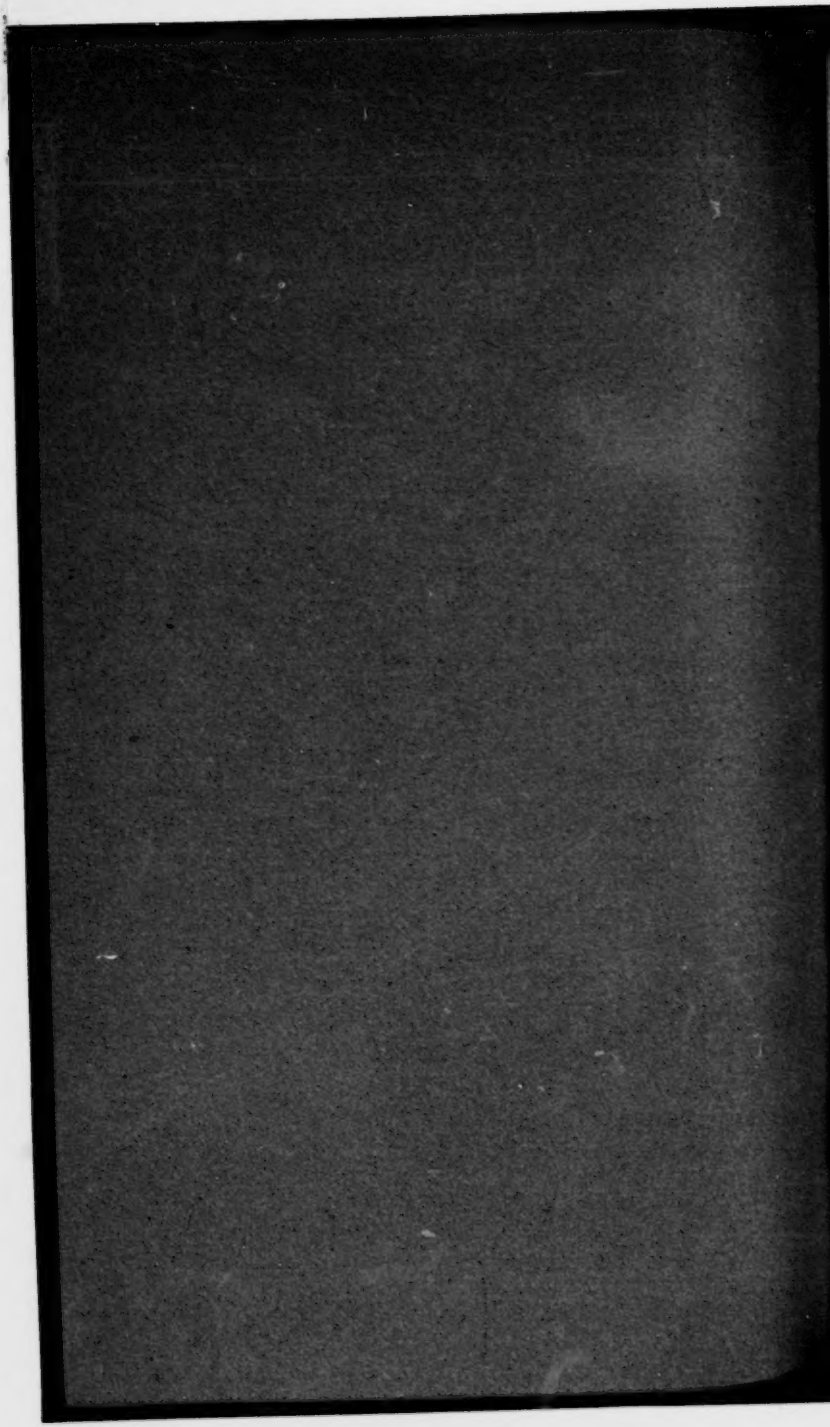
IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS L. CLARKE,
FREDERIC D. MCKENNEY,
Attorneys for Plaintiff in Error.

WAYNE MACVEAGH,
JOHN A. HENDERSON,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1901



Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 183.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ALONZO C. CROOM, AS COMPTROLLER OF THE STATE OF FLORIDA, AND JOHN A. PEARCE, AS SHERIFF OF LEON COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF FOR PLAINTIFF IN ERROR.

Preliminary Statement.

This action was begun on the 2d day of November, A. D. 1892, by a bill of complaint filed by the Florida Central and Peninsular Railroad Company in the circuit court for Leon county, Florida, naming William D. Bloxham, the then comptroller of the State of Florida, and John A. Pearce, then and now sheriff of Leon county, as defendants.

The objects of the bill, as appears from its averments and prayers for relief (p. 15) and as found by the supreme court of the State in its opinion (p. 230), were threefold:

1st. To have the various lines and railroad property described in said bill of complaint declared to be exempt from taxation under the eighteenth section of the internal-improvement act (ch. 610 Laws of Florida, approved January 6, 1855) for a continuing period of thirty-five (35) years from and after the completion of each of said lines; and further that said exemption attached to or was impressed upon the *rem*, and followed the same into whosoever's possession it might come.

2d. To recover, as the successor in interest of the Florida Railway and Navigation Company, the sum of $140,812.47 paid by said company to the tax collector in the year 1885 for taxes alleged to have been illegally assessed against it for the years 1881, 1882, 1883, and 1884; and

3d. To enjoin the collection by the defendants of taxes for the years 1879, 1880, and 1881, assessed against the various lines and properties of complainant under the provisions of acts of the legislature approved February 12, 1885, and June 8, 1891, otherwise identified as chapters 3558 and 4073 of the Laws of the State of Florida.

The laws of Florida in question are as follows:

"*Laws of Florida*, 1885, *Ch.* 3558.

"AN ACT to provide for the assessment and collection of taxes on railroads and the properties thereof for the years 1879, 1880, and 1881, as to which there was no assessment.

"*The people of the State of Florida, represented in senate and assembly, do enact as follows:*

"SEC. I. That in all cases in which any railroad or the properties thereto belonging or appertaining in this State, in the tax years commencing March 1st, 1879, 1880 and 1881, or any of such years were not assessed for taxes for such years, it shall be the duty of the comptroller to cause the same or so much thereof as were not assessed to be assessed for State and county taxes, and twenty per centum of the taxes so assessed for said years and now unpaid shall be collected at the same time the taxes for the year 1885 shall be assessed and collected, and each year thereafter an additional twenty per centum of said taxes shall be collected at the same time and in the same manner as the taxes for such year are collected, until the whole amount of said unpaid taxes for the years 1879, 1880 and 1881 are paid.

"The taxes to be assessed under this act shall be the same in amount as they would have been had they been assessed in such years or any of them as to which there was a failure to assess.

"Approved February 12, 1885."

"*Laws of Florida*, 1891, *Ch.* 4073.

"AN ACT to provide for the collection of taxes assessed under and in pursuance of 'An act to provide for the assessment and collection of taxes on railroads and the properties thereof for the years 1879, 1880, and 1881, as to which there was no assessment, being chapter 3558, Laws of Florida.'

"*Be it enacted by the legislature of the State of Florida:*

"SECTION I. That the State and county taxes assessed by the comptroller of the State of Florida, upon any railroads and the properties thereof in said State, for the years 1879, 1880 and 1881, under and in pursuance of 'An act to provide

for the assessment and collection of taxes on railroads, and the properties thereof for the years 1879, 1880 and 1881, as to which there was no assessment' but which have not been collected, shall be collected, and the payment thereof be enforced at the same time and in the same manner, as is now, or may hereafter be provided by law, for the collection and the enforcement of the payment of taxes assessed upon the railroads and properties thereof in the State of Florida.

"SECTION II. That this act shall take effect immediately after its passage.

"Approved June 8, 1891."

The circuit court by its decree, dated November 25, 1893, denied the first two objects of relief so sought, but granted the third (pp. 39–41), and on appeal the State supreme court, on March 19, 1895, affirmed said decree in part and reversed it in part AND REMANDED THE CAUSE FOR FURTHER PROCEEDINGS TO BE HAD IN ACCORDANCE WITH THE OPINION OF THE SUPREME COURT (p. 45).

Upon the remittitur further proceedings were had in the trial court consisting, among others, of a petition for leave to file a supplemental bill in the nature of a bill of review (p. 50), an order granting leave to file the same (p. 55), the filing of such supplemental bill and a demurrer thereto (p. 61), and entry of an order February 26, 1896, overruling such demurrer (p. 63), and a further appeal from such order to the State supreme court (p. 63).

On this appeal error was assigned in the granting leave to file the supplemental bill and in the order overruling the demurrer thereto (p. 64), and, the cause having been again submitted to the supreme court, the decree or order of the trial court overruling the demurrer was, on the 17th

day of March, 1897, reversed, and the cause remanded with directions to "dismiss the supplemental bill in the nature of a bill of review, and to enter a final decree in accordance with the former judgment of this court upon which a mandate will again issue; and it is further ordered that the appellee, within ninety days after the decree is entered by the circuit court, may have leave to apply to the said circuit court for leave to file a bill of review to the extent of the line of railroad mentioned in the decree from Jacksonville to Chattahooche and branches" (p. 66).

Pursuant to such decree, the mandate of the State supreme court, striking down the decree of the circuit court of November 25, 1893, and remanding the case for further proceedings, in accordance with the opinion of the court, again issued on the 22d day of May, 1897 (p. 66), and at the same time there was also issued a further mandate, directing the circuit court to dismiss the supplemental bill, in the nature of a bill of review, and to ENTER A FINAL DECREE IN ACCORDANCE WITH THE FORMER JUDGMENT OF THE COURT, WITH LEAVE TO THE APPELLEE, THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, TO APPLY, WITHIN NINETY DAYS AFTER THE DECREE WAS ENTERED BY THE CIRCUIT COURT, FOR LEAVE TO FILE A BILL OF REVIEW TO THE EXTENT OF THE LINE OF THE RAILROAD MENTIONED IN THE DECREE FROM JACKSONVILLE TO CHATTAHOOCHE AND BRANCHES, and commanding "such further proceedings" to be had in said cause as according to right, justice, the judgment of said supreme court, and the laws of the State of Florida ought to be had.

June 19, 1897, a decree was entered in the circuit court pursuant to the mandates of the State supreme court issued May 22, 1897, whereby (1) the former decree of the circuit

court, dated February 20, 1896, overruling the demurrer to plaintiff's supplemental bill in the nature of a bill of review, was reversed, the demurrer sustained, and said supplemental bill dismissed at plaintiff's costs; (2) and reaffirming in part and reversing in part and otherwise modifying the decree of November 25, 1893, and (3) perpetually enjoining and restraining the defendants Bloxham and Pearce from selling or attempting to sell certain specified portions of complainant's lines of railroad under the assessment for the years 1879, 1880, and 1881 (pp. 104, 105).

September 18, 1897, under the permission granted by the supreme court, plaintiff filed its petition for leave to file a bill of review (p. 105 *et seq.*), and in such petition requested "by way of supplement" that "William H. Reynolds, as comptroller of the State of Florida," be made a party defendant thereto in lieu of W. D. Bloxham, "who had ceased to be such comptroller" (p. 141).

September 18, 1897, Reynolds was substituted as party defendant in place of Bloxham, and complainant was granted leave to file its bill of review, as prayed for in its petition (p. 142), and such bill of review was thereafter filed (p. 143), and defendants having answered the same and issue having been joined, testimony was taken; and thereafter, on the 6th day of January, A. D. 1900, the circuit court entered its final decree in the cause, ordering, among other things (p. 216):

"1. That so much of said proceedings as prays that the defendants be enjoined and restrained from the collection of taxes assessed in 1885 for and on account of the State of Florida on the line of the railroad of the complainant company that lies between Fernandina and Cedar Keys and Waldo and Ocala for the years 1879, 1880 and 1881, and

on the line from Ocala (*to Waldo*) to Wildwood for the taxes for the years 1881, be and the same is hereby denied.

"2. It is further ordered, adjudged, and decreed that as to the taxes thus assessed for the years 1879, 1880 and 1881, the collection of which is likewise prayed to be enjoined on so much of the lines of the railroad of the complainant as lies between Jacksonville and River Junction, with branches thereof to Monticello and St. Marks, the prayer of the said complainant is granted, and the defendants, William H. Reynolds, as comptroller of the State of Florida, and John A. Pearce, as sheriff of Leon county, be, and they are hereby, forever enjoined from collecting the same or in anywise interfering with said complainant on account of the same.

"3. It is further ordered, adjudged, and decreed that *as to* the prayers of the complainant as in said proceedings made, other than herein allowed, be, and the same are, hereby denied."

From this decree, on January 8, 1900, a further appeal was prayed to the supreme court of the State by the defendants (p. 217), and errors were assigned, including, among others, the following (p. 218):

"3. The circuit court erred in decreeing:

"(1.) That so much of said proceedings as prays that the defendants be enjoined and restrained from the collection of taxes assessed in 1885 for and on account of the State of Florida on the line of railroad of the complainant company that lies between Fernandina and Cedar Keys and Waldo and Ocala for the years 1879, 1880, and 1881, and on the line from Ocala (*to Waldo*) to Wildwood for the taxes of the year 1887, be, and the same is hereby, denied.

"4. The circuit court erred in decreeing:

"(2.) It is further ordered, adjudged, and decreed that as to the taxes thus assessed for the years 1879, 1880, and 1881, the collection of which is likewise prayed to be enjoined on so much of the lines of the railroad of the complainant as lies between Jacksonville and River Junction, with branches thereof to Monticello and St. Marks, the prayer of the said complainant is granted, and the defendants, William H. Reynolds, as comptroller of the State of Florida, and John A. Pearce, as sheriff of Leon county, be, and they are hereby,

forever enjoined from collecting the same or in anywise interfering with said complainant on account of the same.

"5. The circuit court erred in decreeing:

"(3.) It is further ordered, adjudged, and decreed that *as to* the prayers of the complainant, as in said proceedings made, other than as herein allowed, be, and the same are hereby, denied."

On the 26th day of June, A. D. 1900, the supreme court of the State on hearing such appeal entered a final decree in the following terms (p. 222):

"This cause having been submitted to the court * * * it seems to the court there is error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court enjoining the sale for taxes assessed for the years 1879, 1880 and 1881, on the line of the appellee's road from Jacksonville to Chattahooche and branches is reversed, and the bill of reviews is hereby dismissed, and it is further ordered that the appellants do recover of the appellee their costs," etc., etc.

To review this decree and all the proceedings in the cause upon which it is either founded or operates, the writ of error from this court was allowed on the 24th day of October, A. D. 1900, and the transcript of the record was filed and docketed in the Supreme Court of the United States on the 29th day of the same month.

Since the case has been pending in this court, the defendant in error Reynolds has died, and, at the instance of the counsel for defendants in error, Alonzo C. Croom, Reynolds' successor in office as comptroller of the State of Florida, has been substituted in his stead as a party defendant.

Federal Question Involved.

The Federal question involved in the case, as stated in the petition for the allowance of the writ of error (pp. 222, 223), is that by the proceedings in the cause there was drawn in question the validity of the statute of the State of Florida approved February 12, 1885, to wit, "An act entitled An act to provide for the assessment and collection of taxes on railroads and the properties thereof for the years 1879, 1880 and 1881, as to which there was no assessment;" and also the validity of the assessment of taxes for State and county purposes under and in pursuance of said statute upon the lines of plaintiff in error's railroad from Jacksonville, Florida, to the Chattahoochee river, with branches from Tallahassee to St. Marks and from Drifton to Monticello, and the lines from Fernandina to Cedar Keys and from Waldo to Ocala, all in said State of Florida, on the ground that said statute and all taxes imposed thereunder were repugnant to the Constitution of the United States; and the decision of the State supreme court was in favor of the validity of said statute and the assessments made thereunder.

In addition to the Federal question so stated, which will be particularly relied upon in this court both as to the matter of jurisdiction and on the merits, a further Federal question was raised by the record growing out of the alleged conflict between the internal-improvement act of Florida, being chapter 610 of the Laws of Florida, approved January 6, 1855, and the act of 1885, above referred to, viewed in the light of the prohibitions of the Constitution of the United States, but such question was decided adversely to

the contention of complainant by the State courts and is no longer relied upon.

It is conceded by plaintiff in error that the decrees of the circuit court, as affirmed by the supreme court, in so far as they denied the first two objects of relief sought by complainant's bill, were technically correct, and no attempt to reverse the same will be made here.

The sole relief sought in this court is to obtain a reversal of the decree of the State supreme court, in so far as it reversed the decree of the circuit court enjoining the sale of complainant's lines of railroad for the taxes assessed for the years 1879, 1880, and 1881, such taxes amounting to $96,181.69.

Pleadings and Procedure.

This cause was originally heard upon bill and answer and these pleadings, filed at the threshold of the proceedings, have been preserved and reiterated at every subsequent stage thereof.

By its bill of complaint the complainant averred that it was a corporation duly organized in November, 1888, and that it owned various lines of railroad and appurtenant properties fully described in its said bill.

Of such lines of railroad those designated as A, B, C, and E were constructed prior to 1865 (p. 3) under the terms of the internal-improvement act of 1855, but for non-compliance with the requirements of said act in the payment of interest upon the completed roads, said roads were seized by the trustees of the internal-improvement fund and sold, and

thus passed into the control of various companies through which complainant deraigns title (p. 6).

The roads designated in the bill of complaint as D, F, G, H, and J were all completed and in operation prior to 1884 (p. 3).

Roads K and L were completed and in operation in 1887, and road M in 1891 (p. 3).

On the 29th of February, 1884, the various corporations then owning the roads above designated as A, B, C, D, E, F, G, H, and J, all of which had been completed and put in operation prior to 1884, were consolidated into a single company called the Florida Railway and Navigation Company (p. 8). The lines designated as K, L, and M were subsequently constructed, but no question concerning them arises on this writ of error.

At the time of the consolidation and the organization of the Florida Railway and Navigation Company, in February, 1884, each of the consolidated companies had an outstanding bonded indebtedness secured by deeds of trust upon their respective properties aggregating several millions of dollars, and under the terms of said deeds of trust said properties were liable to foreclosure and sale for failure to pay interest or principal, and in the event of the failure to pay the former the entire indebtedness, at the election of the holder, became due and payable (p. 8). To secure the consolidation of the various underlying properties into the Florida Railway and Navigation Company, as is averred by the bill of complaint, mutual concessions were necessary, and said changes and consolidations were made by radical changes in the holdings of the capital stock of said companies, and with each and every of such

changes and consolidations parties not before interested in the one or the other of said consolidated companies thus became *bona fide* holders of legal estates in such other companies from the dates of such consolidations, and entitled to the protection of the existing laws applicable to such properties from and after the dates of such acquisition, and that the holders of the capital stock of the Florida Railway and Navigation Company from the date of the consolidation of the constituent companies under that name "became *bona fide* holders of proprietary interests in each of said constituent properties (and) which interests were then acquired subject to the laws of such property as they then existed and (were) entitled to the protection of such laws. Such existing laws were a part of the contract under which they thus acquired their said property" (p. 9).

Under the terms of the act of 1855—the internal-improvement act—the railroads of complainant, designated from A to J, inclusive, had been held by the taxing authorities of the State to be exempt from State and county taxes until the year 1885, when, under the provisions of the act of February 12, 1885 (chapter 3558, Laws of Florida), the then comptroller of the State, on October 18, 1885, made an assessment upon all of the lines of railroad of the Florida Railway and Navigation Company for the years 1879, 1880, and 1881.

On the 1st day of July, 1884, prior to the passage of the act of 1885 (chapter 3558, *supra*), and more than a year prior to the assessment of taxes for said years 1879–1881, the Florida Railway and Navigation Company had made an issue of $10,000,000 of first-mortgage coupon bonds, secured

by a deed of trust upon all of its property, including the several lines of railroad above designated, and had disposed of more than $5,000,000 of said bonds for value to *bona fide* holders (p. 13), the underlying bonds of the constituent companies being still outstanding and unredeemed (p. 13).

Default having been made in the payment of interest upon said bonds and the entire bonded indebtedness having thereby become due and payable, bills for the foreclosure and sale of all the lines of railroad of said Florida Railway and Navigation Company were duly filed by W. Bayard Cutting, a judgment creditor, and the several trust companies representing the holders of said bonds, and foreclosure and sale having been decreed, all of said lines of railroad and properties, on the — day of March, A. D. 1889, were sold severally under their first liens and as a whole under the lien of the mortgage of the Florida Railway and Navigation Company (p. 13).

At such sales said W. Bayard Cutting, representing said bondholders, bought all of said properties, and he and his associates having theretofore organized the Florida Central and Peninsular Railroad Company (the complainant) for such purpose, said company was let into the possession of said properties on the 1st day of May, 1889, and has maintained such possession ever since (p. 13).

At the date of the bond issue of the Florida Railway and Navigation Company above referred to, namely, July 1, 1884, and of the deed of trust given to secure the same, under the lien of which, as subsequently foreclosed, the plaintiff in error came into possession of the properties in question, none of the taxes, the collection of which is here sought to be enjoined, had been assessed upon the several lines

of railroad above enumerated for the years 1879, 1880, and 1881, nor were such taxes for said years due and unpaid upon any of said properties. At said date and for many years prior thereto, there was in force a statute, designated as chapter 3413 of the Laws of Florida of 1883, section 26 of which is as follows:

"ASSESSMENT OF LAND PREVIOUSLY OMITTED.—If any assessor, when making his assessments, shall discover that any land in his county was omitted in the assessment-roll of either or all of the three previous years, and was then liable to taxation, he shall, in addition to the assessment of such land for that year, assess the same separately for such year or years that may have been so omitted, at the just value thereof in such year, noting distinctly the year when such omission occurred; and such assessment shall have the same force and effect as it would have had if made in the year the same was omitted, and taxes shall be levied and collected thereon in like manner and together with the taxes of the year in which the assessment is made; but no lands shall be assessed for more than three years' arrears of taxes; and all lands shall be subject to such taxes omitted to be assessed, into whosoever hands they may come."

Referring to this statute, complainant averred in its said bill of complaint that the taxing power of the State was expressly prohibited thereby "from taxing said company's road, or any other property in the State, even in case the same had been improperly omitted from the taxing rolls and had thus improperly escaped taxation, for more than three previous years from the time of making an assessment."

Complainant also averred that properties of large value, to wit, lands in various counties of said State, had been improperly omitted from assessment for taxes during the years

1879, 1880, and 1881 and each of them, and that the act of February 12, 1885, aforesaid (chapter 3558 of the Laws of Florida), was unconstitutional and void, in that the same did not provide for a uniform and equal rate of taxation; and, further, that it did not attempt to secure a just valuation and assessment of all classes of property, but was enacted to reach only property of the class belonging to the complainant, namely, railroad property, and that there was no law in existence at such time for reaching other classes of property, which were omitted from assessment and which had thereby escaped taxation for said years, nor had there since been enacted any law to remedy such wrong (p. 12).

Also that at the time the Florida Railway and Navigation Company was organized as a corporation and acquired its lines of railroad, as aforesaid, it found such properties as were then in existence and now form part of plaintiff in error's system assessed for taxes for the year 1880 and subsequent years, and it was insisted that "it was an exhaustion of the State's and the tax-making power over the property when the (such) assessment was made, and the time provided by law for correcting errors therein had expired, which time has long since elapsed in so far as the same could be made a lien on the property itself;" and, further, "that the right to levy any additional tax on the values of said property, if it exists at all, exists only as against the owners at the time of the property, and that the same is not now a lien on the property of your orator, and that any law of subsequent enactment which attempts to create a lien on this property in the hands of purchasers for value is void" (p. 12).

Also "that the rights and interest of the complainant in the said several properties relate back to the date of the said several respective mortgages created as aforesaid," * * * and that complainant "is in no otherwise whatever the successor to the Florida Railway and Navigation Company, and that it holds its property under and by virtue of liens created a long time in *the* advance of the pretended assessments under chapter 3558 of the Laws of Florida" (p. 14); and "that on the 8th day of June, 1891, without any previous notice whatever to your orator, there was approved by the governor of the State of Florida an act, being chapter 4703 of the Laws of Florida" * * * and that, "pretending to act under the authority of said act, the comptroller of the State of Florida has directed and the sheriff of Leon county intends and has undertaken to seize and sell the property of your orator for the State and county taxes so illegally assessed for the years 1879, 1880, and 1881" * * * (p. 14).

The relief prayed, in addition to other things, was that the circuit court would decree:

"8th. That your orator's lines of road and no part of them are subject to the payment of the tax assessed against them in A. D. 1885 for the years 1879, 1880 and 1881" (p. 15).

Defendants, in the answer, denied "that the property of the Florida Railway and Navigation Company and its constituents were in fact exempt from taxation at the time of the passage of said act" (1885, chapter 3558), and averred "that the State officers were authorized to to levy upon said property for said taxes" (p. 27); and further denied "that by reason of the several consolidations of

roads mentioned into * * * the Florida Railway and Navigation Company there was anything in or any existing laws of such property acquired by which they or the complainant herein can claim or receive any immunity or exemption from taxation or the taxes demanded now from them by the State of Florida" (p. 29).

Defendants further denied "that the exemption of the said lines of railroad set forth in said bill from taxation for the periods of time alleged became by contract of the State a part and parcel of the property value of said roads, and that this exemption became a part of the value of the property of the railroad which complainant acquired in its acquisition of each and all of its said lines, and deny that this was the law of the property as declared by the court of this State (Florida) when the Florida Railway and Navigation Company acquired the same, and that as to so much of complainant's bill as sets forth the claim that complainant is exempt from the payment of the taxes demanded by the State of Florida and by these defendants sought to be collected by the levy and proposed sale complained of, these defendants claim all the benefits they could have from a demurrer interposed thereto" (p. 29).

Further answering, defendants denied "that the act under which W. D. Barnes, comptroller, claimed to assess back taxes for the years 1879, 1880, 1881 was not a law of the State of Florida," * * * and denied "that said act of assessment was in violation of complainant's alleged exemption, and that said act is null and void" (p. 30), and admitting that the assessment by Barnes, comptroller, on the lines of the Florida Railway and Navigation Company was made

under chapter 3558, Laws of Florida, denied that said act was "unconstitutional and in violation of any contracts and rights of the Florida Railway and Navigation Company, its stockholders and bondholders," and averred that "said act is legal, just, and constitutional" (p. 30).

And as to such portions of complainant's bill as claimed that there was no lien on the lines of road acquired by the Florida Railway and Navigation Company at the time of acquirement, and that chapter 3558, Laws of Florida, was unconstitutional and void, in that it did not provide for a uniform and equal rate of taxation and did not secure a just valuation and assessment for all classes of property, and that the State's power of taxation was exhausted over the property when the assessment was made, as shown by Exhibit "C;" and to such portions as denied the right of the State to levy an additional tax on the values of the Florida Railway and Navigation Company; and to those portions relating to the issue of $10,000,000 of bonds and the disposition of $5,000,000 thereof, and to the foreclosure and sale of the properties of said company and the purchase of the same by Cutting as agent, "as showing any reason why the taxes sought to be collected by the levy and proposed sale herein are not due to the State of Florida," defendants claimed "all the benefits they could have from a demurrer interposed thereto" (p. 31).

Defendants admitted the passage and approval of chapter 4703, Laws of Florida, as alleged, and also that under the authority of said act "and the acts to which it relates they had seized and levied upon the property of complainant, as alleged, "to pay the taxes due on the same for the years 1879, 1880, and 1881, * * * and that they will sell said property of the complainant for the purpose of

paying such due and unpaid taxes for said years," unless such taxes, with costs and expenses, be paid before such sale (p. 31).

It further appeared from the bill (p. 13) and was admitted by the answer (p. 31) that the amounts realized from the foreclosure sales fell far short of even the accumulated interest on the bonded indebtedness of the roads forming the system of the Florida Railway and Navigation Company.

The cause having come on for hearing on the application for an injunction *pendente lite*, it was stipulated between the attorneys for the respective parties—

"That if said decision shall be for a refusal of the injunction that thereon a decree may be entered dismissing complainant's bill of complaint, but that said order or decree shall have the same force and effect as if there had been a temporary injunction, which was dissolved by the action of the court. There having been, by mutual consent, proceedings in accordance with such practice as would have followed an injunction, exception to the absence of a formal writ of injunction is waived in both this court and the supreme courts either of Florida or of the United States—this without prejudice as to the exercise of the full discretion of the court, and A FINAL DECREE UPON THE MERITS MAY ALSO BE ENTERED HEREIN IN ACCORDANCE WITH ITS FINDINGS" (p. 39).

The cause having thus come on for hearing in the circuit court upon bill, answer, and exhibits, it was on November 25, 1893, adjudged and decreed, among other things, as follows:

"4th. That the taxes now attempted to be collected on the said several lines of railroad owned by the complainant by the defendant William D. Bloxham, as comptroller, and John A. Pearce, as sheriff of Leon county, under assessment made thereon in A. D. 1885, by virtue of a statute passed A. D.

1885, chapter 3558, Laws of Florida, on the aforesaid lines of railroad and branches, now the property of the complainant, but which *was* so assessed on the same for the years A. D. 1879, A. D. 1880, and A. D. 1881, and which were assessed then as the property respectively of the Jacksonville, Pensacola and Mobile railroad, the Florida Central *and* railroad, and the Transit Peninsular Railroad Companies, were and are not liens on said several lines of railroad for the several years aforesaid for which said assessments were made, and were not and are not assessable against the Florida Railway and Navigation Company; that the said statute under which the assessments were made for the years last aforesaid was a special statute for the collection of general revenue and did not provide or attempt to provide a uniform, equal, and just assessment or collection of taxes for the years A. D. 1879, A. D. 1880, and A. D. 1881, and that so much and that such part of said statute of A. D. 1885, chapter 3558, Laws of Florida, as attempts to provide for an assessment and collection of taxes for the years A. D. 1879, 1880, and 1881 is, as to the complainants' said property, unconstitutional and void, and the State of Florida, by its legislature having repeatedly and expressly limited its right to assess property, omitted from assessment for taxes for more than three years next preceding the assessment thereof the said assessments so made as aforesaid or attempted to be made on the said properties of the complainants for the years A. D. 1879, A. D. 1880, and A. D. 1881, under the provisions of the act aforesaid, and the said warrant and tax levy is hereby adjudged and decreed to be unequal, unlawful, unconstitutional, and void.

"5th. And that the said defendants, the said William D. Bloxham, as comptroller of the State of Florida, and John A. Pearce, as sheriff of Leon county, Florida, their agents and servants, and each and every of them, be, and they are hereby, perpetually enjoined from selling or attempting to sell the said several lines of railroad of complainants or any part or parts thereof under said assessment for the years A. D. 1879, A. D. 1880, and A. D. 1881, and from in any way or manner interfering with or attempting to collect the said taxes for said years last aforesaid" (pp. 40, 41).

From this decree defendants appealed to the supreme court of the State (p. 41) and assigned as error so much of the decree of the circuit court as held—

(1.) "That the taxes attempted to be collected as set out in said decree and for the years named therein were not assessable against the several lines of railroad described therein, and that the statute under which the assessments named in said decree were made, was, as to the property therein also named, unconstitutional and void, and in further rendering its final decree that the assessments, warrant, and tax levy set out and described in said decree were unequal, unlawful, unconstitutional and void;" and

(2) In enjoining appellants "from selling or attempting to sell the said several lines of railroad or any part or parts thereof of the complainant company for the taxes assessed against them for the years 1879, 1880, 1881, as set out in the 5th paragraph of said final decree" (pp. 42, 43).

The complainant also assigned errors (p. 43), no one of which is at all important here. March 19, 1895, the supreme court of Florida affirmed said decree in part and reversed it in part, and so much thereof as held that the lines of railway were not assessable for the years 1879–1881, and enjoined the appellants from attempting to sell same under the assessments made for the taxes for said years, was "REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THE OPINION OF THE COURT FILED HEREIN" (p. 45).

Petition for rehearing was filed May 20, 1895, by the Florida Central and Peninsular Company insisting that the assessments made under the act of 1885 for the years 1879–1881 were made against lands which had passed into the hands of innocent holders for value when they were free from liens (p. 46), and the attention of the court was again called "to the statutory limitation of three

years preceding an assessment in the exercise of the power of assessment for omitted taxes" (p. 48).

The petition for rehearing having been denied (p. 48), the mandate of the Supreme Court embodying the decree above mentioned, and particularly the clause thereof remanding the cause "for further proceedings in accordance with the opinion of the court filed herein," issued (p. 49). No decree was entered in the circuit court upon this mandate, and, pursuant to their understanding of the scope of the direction for "further proceedings," the complainant applied for leave to file a supplemental bill, setting up at greater length and in detail the circumstances upon which it relied to substantiate its claim that it was a *bona fide* purchaser and holder of the properties in question free from lien for the taxes for 1879–1881 (pp. 50–54), and such application having come on for hearing and having been submitted upon brief of counsel "for said parties respectively," it was ordered and decreed by the court that "said complainant has leave to file its supplemental bill in the nature of a bill of review in the above-entitled cause" (p. 55), and no exception having been taken by defendants to such order or decree, complainant's supplemental bill in the nature of a bill of review was filed November 12, 1895 (p. 55 *et seq.*).

To the supplemental bill so filed defendants demurrep upon various grounds (p. 62), and the demurrer having been set down for hearing, it was, on February 26, 1896, overruled by the court (p. 63).

Defendants appealed from this order overruling their demurrer (p. 63) and assigned as errors:

1. That the circuit court erred in allowing the supplemental bill to be filed;

(2) And in overruling the demurrer interposed thereto (p. 64).

Upon consideration of this appeal the supreme court of Florida, on March 17, 1897, decreed that the decree of the circuit court—

"Overruling the demurrer will be reversed and the cause remanded with further directions that the circuit court dismiss the supplemental bill in the nature of a bill of review and enter a final decree in accordance with the former judgment of this court, upon which a mandate will again issue; and it is further ordered that the appellee, within ninety days after the decree is entered by the circuit court may have leave to apply to the said circuit court for leave to file a bill of review to the extent of the line of railroad mentioned in the decree from Jacksonville to Chattahooche" * * * (p. 66).

The mandates of the Supreme Court based on this decree having been issued May 22, 1897 (pp. 66–68), and duly filed in the circuit court, a decree in obedience thereto was entered in that court on June 19, 1897 (p. 104), and thereafter, on the 13th day of September, 1897, complainant, availing itself of the permission granted by the Supreme Court, filed its petition for leave to file a bill of review (pp. 105–142), and such leave was granted the same day (p. 142).

The bill of review filed pursuant to such leave recited the pleadings and proceedings theretofore had in the case *verbatim et literatim* (pp. 143–176), and added that all the foreclosure proceedings and transfers of the several lines of railroad and railroad property mentioned in complainant's original bill of complaint were had in

and under the authority of the circuit court of the United States for the northern district of Florida; that all orders, decrees, accounts, and other papers and documents relating thereto were filed or recorded as a part of and among the records of said court; that before the filing of petitioner's original bill, to wit, on the 29th day of May, 1891, the court-house building in Jacksonville, where said court was held and its records kept, together with all of said records, files, papers, and documents were lost and destroyed by fire, and that complainant was thereby deprived of much valuable data and information necessary in the preparation of its bill of complaint and was forced to rely upon memory of individuals, etc., etc. (pp. 176, 177); that complainant was not in existence at the time of the transactions referred to, but was organized to own and operate said railroad properties that had been purchased at a judicial sale in 1889 by persons "who were unfortunate creditors of the previous owner and who were otherwise entire strangers to the property prior to their purchase," and that the narrative of title in petitioner's original bill was only in explanation of the situation at the time of the assessment, "which justified the allegation in the bill of an entire change or ownership for value of the entire property before the date of such assessment."

Complainant further averred in its said bill of review:

"That the supreme court decided, in effect, that the State did not have the power to follow this property for the taxes of 1879, 1880, and 1881 by assessment in 1885 if it had ceased to be in the possession and ownership of the persons to whom it belonged during the time for which such assessment was made into the hands of innocent purchasers for value, and reached its conclusion that the railroad from Jacksonville to Chattahoochee river, with

branches to Monticello and St. Mark's, was owned and operated by Edward J. Reed and associates from September, 1879, to February, 1882, by a wholly mistaken view of the facts not in issue in the case or submitted, and upon an interpretation of the statements of the bill that is entirely at variance with the facts as they existed and the understanding and purport of such statements at the hearing below; that while said original bill, on pages 14 and 15, does allege that Edward J. Reed and associates purchased said line of road at foreclosure sale Sept. 25th, 1879, and conveyed the same Feb'y 28th, 1882, to a company organized and known as the Florida Central and Western Railroad Company, said bill is silent in its allegations as to the possession and ownership of said line of railroad during the time intervening between Sept. 25th, 1879, and February 28th, 1882; and your orator shows that since the said opinion was rendered, with the aid of its counsel, some old letters and portions of accounts have been found which have led to the discovery of what was the actual status of the possession and ownership of said property during said interval, which before then was not known by your orator and which could not be found by it, although it exercised great diligence in the search for the actual facts to set them forth in its bill; and your orator now alleges as evidence discovered since the rendition of said opinion by said supreme court that in fact and in truth during all these years, covering the whole of the period for which these taxes are assessed and for the entire time between September, 1879 (and before), and until Feb'y 28th, 1882, a company known as the Jacksonville, Pensacola and Mobile Railroad Company owned that part of the aforesaid line of railroad between Lake City and Chattahoochee, with branches to St. Mark's and Monticello, and it was possessed, used, and operated by receivers of United States court, viz., Sherman Conant and A. B. Hawkins, who retained the possession of said road and received and retained the tolls and revenues thereof from September, 1879, the date of the sale alleged in the original bill, until after the said sale was confirmed by said court; that on the 10th day of February, A. D. 1882, the said H. R. Jackson, Chas. H. Symonton, and Adolph Engler, purchasers at the sale aforesaid, conveyed the said line of railroad for value to said Edward J. Reed, before which last-named date Reed and his

associates were not owners of and were not possessed of said property, nor in receipt of any of its incomes, or in any way interested therein; that the portion of said road between Lake City and Jacksonville was owned and possessed and enjoyed by the Florida Central Railroad Company, its owners for many years, until the judicial sale thereof on the 6th day of January, 1882, when it was purchased by Edward J. Reed, who for the first time became possessed of the said line of railroad after the confirmation of said sale occurring thereafter within less than ten days from the date of sale aforesaid.

"That said foreclosures and sales and receiverships were had in and under the authority of the circuit court of United States for the northern district of Florida, and all the records and papers of said court in said causes were destroyed by fire, as hereinbefore said, before the preparation and filing of petitioner's original bill; that Sherman Conant, one of the aforesaid receivers, had died prior to that time, and A. B. Hawkins, the other receiver, had removed from the State of Florida to the State of North Carolina; that your orator incurred great expense and labor in the preparation of its said original bill, occasioned by the destruction and loss of the court records aforesaid, and the great time that has elapsed since the occurrence of many of the transactions therein narrated, and exercised all due and reasonable diligence to ascertain, discover, and set forth every fact material to its case; that the aforesaid new matter was not known to your orator and by the exercise of due and reasonable diligence could not be discovered and produced at the hearing upon said original bill, and your orator again avers that it did exercise extraordinary diligence and did avail itself of all known sources of information in its efforts to obtain and set forth in its bill the actual facts of each and every the events, incidents, changes, sales, and all other proceedings material to the full advisement of the court in and about the fair determination of the questions involved in the said controversy, and that it omitted nothing therefrom that was available to it in the exercise of such diligence.

"And your orator most respectfully submits and suggests that while there was no change in the (legal) ownership and possession of the several lines of railroad acquired by the Florida Railway and Navigation Company from the time

of its organization till the assessments were made, still it is charged in petitioner's bill and admitted by the defendants' answer that after said property was acquired by the Florida Railway and Navigation Company, and before it was assessed for taxes for the years 1879, 1880, and 1881, and, to wit, on July 1st, 1884, and before the passage of chapter 3558, Laws of Florida, under which such assessment was made, that said company issued its bonds to the amount of $10,000,000, and that $5,000,000 of said bonds were actually disposed of to holders for value, secured by mortgage or deed of trust upon all the said lines of railroad property, and also that at the time of the formation and consolidation of the original and constituent railroad companies mentioned in said bill into the said Florida Railway and Navigation Company each and every of said several constituent companies had outstanding and unpaid large amounts of bonds by them severally theretofore issued, and secured by mortgage or deeds of trust upon said several lines of railroad respectively; that upon the failure of the said Florida Railway and Navigation Company to pay a certain common-law judgment rendered against it in favor of W. B. Cutting for monies borrowed and for defaults in the payment of the interest on the underlying bonds aforesaid of the several constituent companies, the lines of railroad of said Florida Railway and Navigation Company were, upon bills filed by said Cutting and by the several trust companies representing the holders of said bonds in the circuit court of the United States for the northern district of Florida for the foreclosure of said liens, sold under the decree and authority of said court in the year A. D. 1889, severally under their first liens and as a whole under the lien of the mortgage created by the Florida Railway and Navigation Company, as aforesaid, and that W. B. Cutting, as agent, bought the said property and conveyed it to your orator's company, which he and his associates had organized for that purpose, and that your orator is not otherwise whatever the successor of said Florida Railway and Navigation Company, and it holds its property by virtue of liens created long prior to the assessment made under chapter 3558, Laws of Florida.

"And your petitioner respectfully submits that under undisputed facts your orator occupies the legal position and attitude of a *bona fide* purchaser for value of the whole of

said property at the date of the execution of said several mortgages or deeds of trust, and that at said several dates the State had made no assessments and had taken no steps whatever to collect the said taxes, and that no taxing statute had affixed any lien upon said property, and that at the date when said consolidated bond issue was made under which the system as a whole was sold the time for the assessment and collection of taxes for the years 1879, 1880, and 1881 had passed, and that chapter 3558, under which the assessment was subsequently made, was not enacted until February 12th, 1885, and, having acquired its said property by purchase at the judicial sales aforesaid, your petitioner respectfully submits that it stands in the attitude of a *bona fide* purchaser of said property for value as of the dates of the said several liens securing the bond issues aforesaid, and should have been so adjudged by the court and decreed to hold the same *exempt* from the payment of the taxes as assessed for the years 1879, 1880, and 1881, and your orator suggests and assigns the failure of the court so to decree as error in law, apparent upon the face of said decree, for which the same should be reviewed and reversed. Your orator further shows that the decree rendered by the judge of the 3rd judicial circuit on June 19th, 1897, as a final decree is informal and imperfect and within itself unintelligible, as it can only be read in connection with and by reference to the decree of November 25th, 1893; that it was rendered for and against W. D. Bloxham, as comptroller, who was not at that time comptroller of the State of Florida, and there were no proper parties to said cause at the date of the rendition of said decree.

"And your orator respectfully insists that the aforesaid final decree entered as herein aforesaid ought to be reviewed, revised, and set aside for the many errors in law and imperfections apparent in the body of said decree, as hereinbefore set forth, and that your orator ought to be decreed to be an innocent and *bona fide* purchaser for value of all its railroad property mentioned and described in its said original bill as of a date when the same had not been assessed for taxes for the years 1879, 1880, and 1881, and when the same could not have been so assessed under any law then in force in the State of Florida, and that all of said railroad property in the hands of your orator

ought to be decreed to be exempt from and not subject and liable to the taxes so assessed against it, as herein aforesaid, for the years 1879, 1880, and 1881, and your orator is advised and insists that under the aforesaid circumstances the said last-mentioned final decree, in consequence of the discovery of such new matter aforesaid, ought specially to be reviewed in so far as the same declares your orator's line of railroad from Jacksonville to Chattahoochee, with branches to St. Mark's and Monticello, subject and liable to the payment of the taxes so assessed against it for the years A. D. 1879, 1880, and 1881, and that the first decree rendered on November 25th, 1893, in said cause by his honor John F. White, judge of the 3rd judicial circuit of Florida, in so far as it declares the railroad property of your orator exempt from and not subject to the payment of the taxes assessed against it for the years 1879, 1880, and 1881, and in so far as it enjoins and restrains the defendants from selling or attempting to sell the same for the payment of such taxes, ought to stand and be established and confirmed; and for effectuating the same the said several proceedings, which became abated as to the former defendant, William D. Bloxham, by the expiration of his term of office as comptroller of the State of Florida, should stand and be reviewed against his successor, the said William H. Reynolds, as comptroller of the State."

Defendants answered this bill of review and, admitting to be true the recital of the previous proceedings in the suit, denied much of the new matter above quoted and called for proof thereabouts, and denied "that the new matters alleged in the bill of review were not known to the plaintiff, or by the exercise of due and reasonable diligence could not have been discovered and produced at the hearing on the original bill" (pp. 182–184), and, replication having been filed (p. 185), the cause was referred to an examiner to take testimony (p. 186). Testimony was taken (pp. 187–215) and the cause set down for hearing (p. 215), and thereafter, on January 6, 1900 (p. 216),

the circuit court entered its final decree in the cause, which is set forth at large in this brief (p. 6, *ante*).

On appeal this decree was also reversed by the State supreme court (Record, p. 222; see p. 8, *ante*).

ASSIGNMENT OF ERRORS.

1. IT WAS ERROR ON THE PART OF THE SUPREME COURT OF FLORIDA BY ITS DECREE OF MARCH 19, 1895 (pp. 44, 45), TO REVERSE SO MUCH OF THE DECREE OF THE CIRCUIT COURT FOR LEON COUNTY, RENDERED NOVEMBER 25, 1893 (pp. 39–41), AS HELD THAT THE STATUTE OF FEBRUARY 12, 1885 (chapter 3558, Laws of Florida), UNDER WHICH THE ASSESSMENTS AND PROCEEDINGS COMPLAINED OF WERE MADE AND HAD, WAS A SPECIAL STATUTE FOR THE COLLECTION OF GENERAL REVENUE AND WAS UNCONSTITUTIONAL AND VOID.

2. IT WAS ERROR ON THE PART OF THE SUPREME COURT OF FLORIDA, BY ITS DECREE OF MARCH 19, 1895 (pp. 44, 45), TO REVERSE SO MUCH OF THE DECREE OF THE CIRCUIT COURT FOR LEON COUNTY, RENDERED NOVEMBER 25, 1893 (pp. 39–41), AS HELD THAT THE TAXES WERE NOT LIENS AGAINST THE SEVERAL LINES OF RAILROAD SOUGHT TO BE SUBJECTED TO THE PAYMENT THEREOF AND WERE NOT ASSESSABLE AGAINST THE FLORIDA RAILWAY AND NAVIGATION COMPANY FOR THE YEARS 1879, 1880, AND 1881, AND ENJOINED THE DEFENDANTS BLOXHAM AND PEARCE FROM SELLING OR ATTEMPTING TO SELL SAID RAILWAY OR ANY PART THEREOF FOR THE TAXES FOR SAID

YEARS, OR FROM IN ANY MANNER INTERFERING WITH SAID RAILWAY OR ATTEMPTING TO COLLECT SAID TAXES.

3. IT WAS ERROR ON THE PART OF THE SUPREME COURT OF FLORIDA BY ITS DECREE OF MARCH 17, 1897 (p. 66), TO REVERSE THE DECREE OF THE CIRCUIT COURT FOR LEON COUNTY RENDERED FEBRUARY 26, 1896 (p. 63), OVERRULING THE DEMURRER TO COMPLAINANT'S SUPPLEMENTAL BILL IN THE NATURE OF A BILL OF REVIEW AND REMANDING THE CAUSE TO SAID CIRCUIT COURT WITH INSTRUCTIONS TO DISMISS THE SUPPLEMENTAL BILL IN THE NATURE OF A BILL OF REVIEW.

4. IT WAS ERROR ON THE PART OF THE SUPREME COURT OF THE STATE OF FLORIDA, BY ITS DECREE OF JUNE 26, 1900 (p. 222), TO REVERSE SO MUCH OF THE DECREE OF THE CIRCUIT COURT OF LEON COUNTY, ENTERED JANUARY 6, 1900 (p. 216), AS ENJOINED THE SALE FOR TAXES ASSESSED FOR THE YEARS 1879, 1880, AND 1881 ON THE LINE OF COMPLAINANT'S ROAD FROM JACKSONVILLE TO CHATTAHOOCHE AND BRANCHES, AND DIRECTING COMPLAINANT'S BILL OF REVIEW TO BE DISMISSED.

BRIEF OF ARGUMENT.

I.

In Opposition to the Motion to Dismiss.

That a Federal question was squarely presented by the pleadings and decided adversely to the party claiming the benefit thereof by the State supreme court, seems too plain to require argument. That much at least is conceded by counsel for defendants in error in his brief, as follows:

(P. 5:) "It will be observed that in the original suit a Federal question was raised by the pleadings and decided by the court." * * *

But it is urged in support of the motion to dismiss that such Federal question was not preserved throughout the various subsequent proceedings had in the course of the cause.

We submit that the decree of the State supreme court entered June 26, 1900 (p. 222), was the only final decree entered by that court or any other court in the course of the proceedings which was subject to review in this court on writ of error.

That this decree, as well as the others that preceded it, involved the Federal question upon which the plaintiff in error here relies for relief, is easily demonstrable.

The relief sought by the complainant railroad company was the enjoining of the defendants from collecting taxes levied upon its properties for the years 1879, 1880, and 1881 under retroactive statutes passed in 1885 and 1891.

The Federal questions presented by the pleadings and relied upon here were two—

1. That under the terms of the State law prevailing at the time complainants' predecessor in title became possessed of said properties and executed its deed of trust covering the same the assessment and collection of taxes on properties omitted from the assessment-rolls for prior years was prohibited for more than three years prior to the making of the assessment; that such prohibitory statute entered into and formed a part of the contract between the Florida Railway and Navigation Company, complainants' predecessor in title, and the purchasers of its bonds secured by said deed of trust, and that upon the happening of default and foreclosure of the properties under the terms of said deed of trust its provisions inured to the benefit of the purchaser at such foreclosure sale, and that the laws of 1885 and 1891 directing the assessment of taxes upon complainants' properties for years more than three years anterior to the date of making such assessment (October, 1885) were null and void as in contravention of the prohibition of the Federal Constitution, article 1, section 10:

"No State shall * * * pass any * * * law impairing the obligation of contracts." And—

2. In view of the admitted fact that other real properties of large value in the State had been omitted from the assessment-rolls for the years 1879–1881, and no taxes had been assessed or collected or were attempted to be assessed or collected thereon, the act of 1885 (ch. 3558) was a special statute for the collection of general revenue and did not provide or attempt to provide a uniform, equal, and just assessment

of taxes for such years, and if enforced would deny to persons within the State the equal protection of the laws, contrary to the prohibition of the fourteenth amendment of the Federal Constitution.

The points so raised were both decided in favor of the complainant by the circuit court of Leon county (pp. 39–41), and have constituted the points about which the controversy has revolved to this day.

That the decree of the supreme court of the State reversing the decree of the circuit court and remanding the cause for further proceedings was not such a final decree as could be reviewed in this court on writ of error has been frequently decided.

Grant *vs.* Phœnix Mutual Life Ins. Co., 121 U. S., 118.
District of Columbia *vs.* McBlair, 124 U. S., 320.
Smith *vs.* Adams, 130 U. S., 167.
Meagher *vs.* Minnesota Thresher Co., 145 U. S., 608.
Rice *vs.* Sanger, 144 U. S., 197.
Brown *vs.* Bailer, 146 U. S., 619.
Union Life Insurance Co. *vs.* Kirchoff, 160 U. S., 374.

That decree of the supreme court did not direct the entry of a specific decree by the circuit court, and plainly could not have done so, for without further judicial proceedings were had in the court below it would have been impossible to ascertain the amount of the assessed taxes which were upheld by the supreme court and the amount that was decreed to have been improperly assessed.

But if the finality of this first decree of the State supreme court was in doubt, the doubt should be resolved in favor of the plaintiff in error, in view of the manner in which it was treated in the courts below. It is only in this court that the finality of this decree has been claimed.

McGourkey *vs.* Toledo & Ohio Railway, 146 U. S., 536, 550.

For similar reasons is it also plain that the decree of the State supreme court of March 17, 1897 (p. 66), was not a final decree subject to review in this court.

That decree resolves itself into two branches:

1st. Directing the dismissal of the supplemental bill and the entry of a "decree in accordance with the former judgment of this court."

2d. Granting leave to complainant to apply to the circuit court within ninety days after the entry of such decree to file a bill of review as to so much of said decree as affected the line from Jacksonville to Chattahoochee and branches.

If the decree of 1895 was not final when rendered, it did not become so by being repeated in 1897, and the mandate then issued was but a duplicate of the former one reversing and commanding further proceedings.

It was rendered even less like a final decree than the former one by the addition of the second branch granting leave to file a bill of review, and the principle contended for here is not affected by the fact that the leave so granted only affected a portion of the lines involved, though the fact

is that upon such portion was laid the greater part of the assessments complained of.

The decree of the circuit court of June 19, 1897 (p. 104), was not capable of being reviewed here, because it was not a decree of the highest court of the State in which such decree could be had, nor was it final when entered, and it could have become final only by the complainant electing not to avail itself of the permission of the supreme court to file a bill of review. When leave to this end was applied for and granted by the circuit court all question as to whether it would ever become an appealable decree was at an end. It did not dispose of the entire controversy between the parties. Neither of these decrees directed complainant's bill to be dismissed.

The decree of June 26, 1900, alone fully disposed of the matter in controversy between the parties here sought to be reviewed.

II.

On the Merits.

The complainant, The Florida Central and Peninsular Railroad Company, deraigns its title to the properties referred to in the transcript of record through judicial proceedings and a foreclosure sale made in 1889. This foreclosure sale was the result of the insolvency of the Florida Railway and Navigation Company and its consequent failure to satisfy judgment creditors and pay the interest on its bonded indebtedness of $10,000,000, secured by a deed of trust covering all of its railroad lines and properties. Said deed of trust was executed July 1, 1884, and over one-half of the total bonded indebtedness secured thereby was subsequently

issued and sold for value to *bona fide* purchasers. At the date of said deed of trust and said issue of bonds no taxes had been assessed against the properties of said Railway and Navigation Company for the years 1879, 1880, and 1881, and. under the laws of the State then in force, taxes could only be assessed against such properties as had been omitted from assessment for the three years next preceding the date of levying the assessment. Such restriction on the State's power to levy taxes omitted from assessment was evidently an item of consequence to the purchasers when determining the value of the bonds offered for sale by the company, as it vitally affected the value of the property mortgaged to secure the same, for it was well known that prior to 1881 none of these properties had been sought to be taxed by the State officers since their construction. Many of the lines had been constructed prior to 1864, and the mere assertion of the right on the part of the State in 1884 to assess and collect taxes on said properties for all of such omitted years would speedily have put an end to any market for the bonds then offered, and the exercise of such right would practically have amounted to the confiscation of the various properties in whosesoever hands the same might have come. So it was that the three-year limitation on the taxing power of the State was a valuable element which entered into the terms of every contract made with respect to such properties. Purchasers of the bonds secured by the deed of trust occupied the same relation towards these properties as would have been occupied by a mortgagee under a mortgage thereof.

The deed of trust given to secure the payment of the

bonds was an incident and accessory to them. The purchase and transfer of the bonds carried with it to the purchasers and transferees the benefit of the security and every incident and accessory of it. The trustee in the deed of trust, like a mortgagee, was a purchaser for a valuable consideration. Both occupy the same ground with respect to notice, actual and constructive. They are *bona fide* purchasers until the contrary is made to appear.

Carpenter *vs.* Longan, 16 Wall., 271.

Generally speaking, the rules which apply to legal also apply to equitable estates.

Croxall *vs.* Shererd, 5 Wall., 268.

The law of notice as to the trustee and *cestui que trust* is the same.

New Orleans Canal & Banking Co. *vs.* Montgomery, 95 U. S., 16.

In the absence of notice of any infirmity in the title, the trustee in the deed of trust and the *cestui que trust*, like mortgagees, are to be regarded as *bona fide* purchasers.

Kesner *vs.* Trigg, 98 U. S., 50.

A purchaser with notice of a fraud or infirmity affecting the title may protect himself by obtaining the title of a *bona fide* purchaser for a valuable consideration, without notice, for the *bona fide* purchase purges away the equity from the title in the hands of all persons who may obtain a derivative title from the *bona fide* purchaser.

Rogers *vs.* Lindsey, 13 How., 441.

If either the purchaser or his grantor was a purchaser in good faith, then the purchaser is protected.

Mills *vs.* Smith, 8 Wall., 27.

In both the circuit and supreme court the complainant contended that at the time its predecessor came into possession of the railroad properties described in the bill taxes for the years 1879–1881 had not been assessed against them, and there was no lien in favor of the State for such taxes, for under the laws then in force no tax was a lien upon real estate until assessed, and taxes for omitted years could not be assessed further back than for the three years next preceding the assessment. The act of 1885 was not then on the statute book, and complainant's said predecessors acquired said properties free of any lien for taxes for said years. Upon this view it was contended that the right of the purchaser at the foreclosure of the lien of the mortgage was superior to the right of the State to subject such properties to the payment of back taxes for more than the three years then last past; otherwise the effect of the retroactive statute would be to create a paramount lien for an antecedent tax subsequently laid upon property in the hands of a *bona fide* purchaser for value, and to that extent at least would operate to deprive him of his property without due process of law; and, adverting to this contention, the supreme court of the State, in its opinion, said:

"If the State has the power to pursue property for the payment of taxes when it has ceased to be in the possession or ownership of the persons to whom it belonged during the time for which such assessment was made, in the hands of innocent purchasers for value, such power must arise

from some specific charge or lien upon the property in favor of the State for the taxes thereon. The question therefore arises whether the complainant is such innocent purchaser for value. We do not think that when the time for the assessment and collection of the taxes has passed and the taxing statute affixes no lien to the property, (and) the State has made no assessment or taken any other step to collect the same, that real estate can be pursued for back taxes when it has gone into the hands of innocent purchasers for value.

"The property sought to be taxed in this case is by the laws of this State real estate."

McClellan's Digest, § 30, p. 286; ch. 3099, Laws of Florida, act of 1879, § 2, p. 17.

"Under our laws as they existed prior to the Revised Statutes (1892), there was no lien upon such property for its taxes until fixed by an assessment of the same."

Spratt *vs.* Price, 18 Fla., 289, 301, *et seq.*

L'Engle *vs.* Florida C. & W. R. Co., 21 Fla., 353.

"The only exception to this rule is that provided in various revenue acts, in effect, that assessors might assess real estate which had escaped taxation for any of the preceding years not exceeding three, and that such land should be liable for such back taxes, in whosesoever hands they might come" (p. 237, '8).

Having thus declared the law to be as contended for by complainant, the court disposed of the claim to exemption by holding that complainant was not an innocent purchaser for value. As under the circumstances of this case this was a pure question of law, the propriety of such holding is reviewable in this court.

"It is conceded," says the State supreme court, that the "complainant would not be bound by such assessments if they had been illegal as against the Florida Railway and Navigation Company, its immediate predecessor. Therefore the inquiry arises whether the Florida Railway and Navigation Company was such innocent purchaser

as we have hereinbefore stated could hold the property as against the State's claim for taxes" (p. 238), and the conclusion was reached that it was not; but the argument which led to this conclusion completely ignored the deed of trust executed by the Railway and Navigation Company in 1884, and that the complainant held the property under and as the result of the foreclosure of the lien thereof.

When the bond issue of 1884 was made and the deed of trust to secure the same executed, the taxes for 1879–1881 had not been assessed, and no attempt to assess the same was made until more than three years had elapsed from the expiration of the last so-called "omitted year," and indeed the last of such "omitted years" had elapsed more than three years before the legislature even undertook to authorize such assessment.

The real question in this case is, What title did W. B. Cutting and his associates take by virtue of their purchase at the foreclosure sale? From the authorities above cited it seems to be a logical deduction that they took whatever title the trustee in the deed of trust possessed. They were subrogated to all the rights of the bondholders, and their title under the foreclosure sale related back to the condition of affairs at the date of the deed of trust, viz., July 1, 1884. The title so acquired cut out any subsequent liens which the State might have sought to impress upon the properties by the act of 1885.

If the Railway and Navigation Company, being in possession of the property at the date of the assessment,

was personally chargeable therewith, it may be conceded that the taxes so assessed were a proper charge against its equity of redemption in the property, and if there had been any surplus left after paying the mortgage debt, the same might properly have been subjected to their payment. But it appears from the record that there was no surplus; on the contrary, the amount realized from the sale was not sufficient to pay the accumulated interest on the mortgage debt. To attempt, therefore, by a retroactive statute to make such taxes a charge upon the realty itself, and to attribute to them the character of a superior lien, enforceable against the property even in the hands of a *bona fide* purchaser, is a clear violation of the prohibition of the Federal Constitution against the impairment of an existing contract by a subsequent legislative enactment. If the act of 1885 and the assessments for the years 1879–1881 thereunder be held to be valid, and the taxes so assessed be declared to be a lien against the property, even in the hands of a *bona fide* purchaser, what bar would there be to the passage of further acts by the legislature providing for the assessment and collection of taxes upon these properties for the years from 1868 to 1879, for which years no taxes have been collected? If such course be pursued, what of value would there be left to the bondholders or the purchasers at the foreclosure sales?

The status of the properties at the time the mortgages were executed cannot be altered, so far as the rights of the bondholders are concerned, by subsequent legislation, and as against the bondholders and those claiming by, through, or under them the State should not be permitted by retro-

active legislation to encumber the security for the bonds by any burden which did not exist when the mortgage or deed of trust became effective.

Such legislation is not only retroactive, but it impairs the obligation of the contract between the mortgagor and mortgagee, decreases the value of the security, and in the case at bar, if sustained, would take from the holders of the property acquired in right of the trustee for the bondholders a large sum of money to meet the obligation of a former owner for which the mortgagee was never responsible, and for which the State at the time the mortgage was executed had no lien and no law under which it could acquire one.

But another Federal objection lies to the validity of the act of 1885 (chapter 3558) and the assessments for taxes thereunder. It is averred by the bill of complaint that although there were other real properties of large value in the various counties through which complainant's road ran, which had been improperly omitted from assessment for taxes during the years 1879–1881, and each of them, yet the law of 1885 (chapter 3558) did not attempt to secure a just valuation and assessment for all classes of property, but was enacted to reach only property of the class belonging to complainant, and there was no existing law by which the other classes of omitted property could be assessed for taxes for such years and none has since been passed to remedy such inequality and wrong. This averment was admitted by defendants' answer.

The title of the act of 1885 (chapter 3558) declares it to be "An act to provide for the assessment and collection of

taxes on railroads and the properties thereof for the years 1879, 1880, and 1881, as to which there was no assessment."

This is a clear discrimination against railroad properties in favor of other classes of omitted properties, and denies to the railroad companies owning such properties the equal protection of the laws.

It would seem to be settled beyond argument that corporations are "persons" within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.

County of Santa Clara *vs.* Southern Pacific R. R. Co., 118 U. S., 394.

Covington, &c., Turnpike Co., *vs.* Sanford, 164 U. S., 578–592.

Gulf, Colorado, etc. *vs.* Ellis, 165 U. S., 154.

"In almost every State today there is observable a determination and a tendency to impose upon corporations much more than their fair share of the burdens of taxation. This is now done sometimes under the pretense of classification, and sometimes as a franchise or license tax. That these taxes are becoming grossly unjust and oppressive cannot be denied."

Guthrie, The Fourteenth Amendment to the Constitution of the United States, p. 120.

"The question is not whether the State may not claim for grants of privileges and franchises a fixed sum per year, or a percentage of earnings of a corporation—that is not controverted—but whether it may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations."

Field, J., in San Bernardino Co. *vs.* Southern Pac. R. R., 118 U. S., 417, 422.

The attempt of the legislature of Florida by the act of 1885 (chapter 3558) to levy taxes for prior years upon railroad property to the exclusion of other real properties owned by individuals, which had also escaped taxation for such years, was an unlawful discrimination, grossly unjust and oppressive. It was a "clear and hostile discrimination against particular 'persons' and classes * * * of an unusual character, unknown to the practice of our governments" and obnoxious to the constitutional prohibition.

The discrimination complained of in this case is similar to that inveighed against in "The Santa Clara Railroad Tax Cases," 13 Fed. Rep., 722, which was held to be illegal, and the act authorizing it to be unconstitutional and void.

In Northern Pacific Railroad Co. *vs.* Walker, 47 Fed. Rep., 681, 685, certain lands belonging to railroad companies had been exempted from taxes simply because they were owned by such companies, and it was there held that property of the same kind and in the same condition cannot be divided into different classes for purposes of taxation and taxed by a different rule because it belongs to different owners, whether natural persons or corporations.

While it is quite true that absolute uniformity or equality of taxation cannot, in the nature of things, be expected or attained under any system, nevertheless substantial equality is attainable and is required by the supreme law of the land, and when the inequality is as palpable as it is in the case at bar, going to the length of imposing taxes for past years as to which there had been no assessment upon real prop-

erty owned by railroad companies, to the exclusion of all other real properties by whomsoever owned, the discrimination is serious, and it is the duty of the courts to interfere.

Upon either one of the above grounds the judgment of the State supreme court should be reversed.

III.

Has the Suit Abated for Want of Parties?

This action is founded upon the warrant issued October 5, 1892 (p. 21), by W. D. Bloxham, then comptroller of the State, to restrain him from doing certain acts in his official capacity. Under the law the sheriff acts only by virtue of the authority conferred by the comptroller's warrant and under his direction. The suit was brought to restrain said Bloxham and the sheriff, acting under his orders and by his authority, from selling the complainant's property to collect the taxes illegally assessed.

During the pendency of the proceedings in the State courts Comptroller Bloxham vacated the office of comptroller, and William H. Reynolds became comptroller in his stead. So far as appears from the record, Reynolds took no hand in these proceedings. Certainly he issued no further warrant to the sheriff. Nevertheless he was substituted as party defendant in Bloxham's place, apparently without his consent or acquiescence, and thereby became liable to respond at least in costs for his predecessor's wrong.

Since the case has been pending in this court Reynolds has died, and his successor in office, at his own request, has

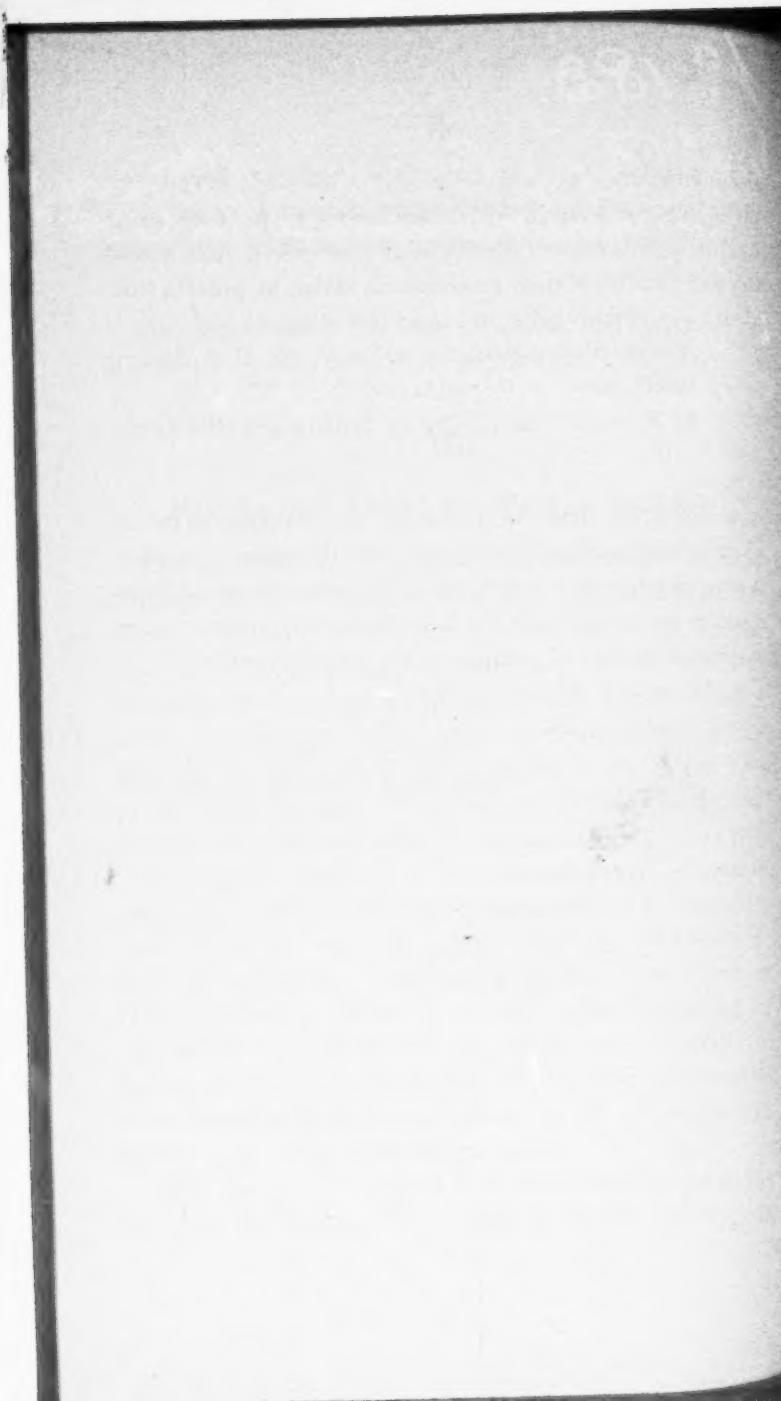
been substituted as party defendant in his stead. There is no statute of Florida which authorizes, in pending suits against public officers who have died or retired from office, the substitution of their successors in order to prevent the abatement of such suits, and upon the authority of—

Warner Valley Stock Co. *vs.* Smith, 165 U. S., 28;
Smith, Sec'y, *vs.* Reynolds, 166 U. S., 717;
U. S. *ex Rel.* Bernardin *vs.* Butterworth, 169 U. S., 600,

it would seem that the decrees of the supreme court of Florida herein should be reversed and the cause remanded to that court, with instructions to that court to remand the cause to the circuit court for Leon county, with instructions to dismiss the bill of complaint for want of parties.

T. L. Clarke,
Frederic D. McKenney,
Attorneys for Plaintiff in Error.

Wayne MacVeagh,
John A. Henderson,
Of Counsel.



FILED
NOV 25 1901
JAMES H. McKENNEY,
Clerk

No. 183.

Sup. Ct of Clarke, M Kenney
Isaac v Henderson for P.E.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 25, 1901.

No. 183.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ALONZO C. CROOM, AS COMPTROLLER OF THE STATE OF FLORIDA, AND JOHN A. PEARCE, AS SHERIFF OF LEON COUNTY.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

THOMAS L. CLARKE,
FREDERIC D. McKENNEY,
Attorneys for Plaintiff in Error.

WAYNE MACVEAGH,
JOHN A. HENDERSON,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1902

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 183.

THE FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ALONZO C. CROOM, AS COMPTROLLER OF THE STATE OF FLORIDA, AND JOHN A. PEARCE, AS SHERIFF OF LEON COUNTY.

Supplemental Brief for Plaintiff in Error.

In the reply brief for defendant in error the point is made that prior to the date of the bond issue by the Florida Railway and Navigation Company (July 1, 1884) the legislature of Florida had by the joint resolution of March 4, 1881 (see Reply Brief, p. 4), "declared its belief in the liability to taxation of these lines of railroad, and had directed the

governor and the comptroller of the State to institute suit to test their liability to such taxation."

It needs but a glance at the resolution itself to demonstrate that it has no bearing upon the present controversy. By its title it is declared to be a joint resolution "requiring the governor and comptroller to institute legal proceedings against all railroad companies *who have refused to pay taxes on their railroad property.*"

In the preamble it is recited that "Whereas said railroad companies *refuse to pay taxes* on the said railroad property," and by section 1 it is provided "that the governor and comptroller be, and they are hereby, required to institute legal proceedings against said railroad companies *who have refused to pay taxes on their railroad property,*" etc.

As the properties of the railroad companies which by consolidation or combination formed the Florida Railway and Navigation Company had not been assessed for taxes prior to October, 1885, and consequently had not *refused to pay taxes,* they were not within the purview of the joint resolution.

At the date of the bond issue and deed of trust to secure the same, viz., July 1, 1884, no taxes had been assessed against any of these properties, nor was there any law upon the statute books which permitted them to be assessed for past years unless section 26 of chapter 3413 of Laws of 1883, authorizing the tax assessors to assess lands previously omitted for "three years' arrears of taxes," was applicable to railroad properties.

Counsel for defendants in error insist that that law has no application to such properties. Hence we reply that

then there was not in 1884 any law in Florida which permitted tax assessors or any other official to assess taxes upon railroad properties for past years. The joint resolution of 1881 clearly did not confer any such power, and it is equally clear that chapter 3039 of the Laws of 1879 (see Reply Brief, p. 6), referred to by defendants in error, did not do so.

Our opponent's contention, then, is that in 1884, when the lien of the deed of trust or mortgage under which plaintiff in error claims by virtue of foreclosure proceedings was fastened upon these properties, there was no law of Florida which in any shape or form authorized the assessment of any back taxes upon railroad properties, and that no such law was enacted until the lien of the deed of trust herein was almost one year old, and more than $5,000,000 of the bonds secured thereby had passed into the hands of innocent purchasers for value.

By the law of 1885 the State attempted to authorize the assessment of taxes for 1879–1881, but only upon property belonging to railroad companies, though it appears from the record that other properties of like class, *i. e.*, real estate belonging to individuals and owners, not railroad companies, had not been assessed for taxes for such years.

It surely cannot be "due process of law" for the State of Florida in 1885 to arbitrarily impose a burden theretofore unheard of upon security-holders who in 1884 had invested their money upon the faith of a title then clear of such burden.

It surely cannot be less than a denial of the equal protection of the laws for the State of Florida in 1885 to im-

pose burdens theretofore unheard of upon the property of railroad companies, which under the laws of Florida is real estate (R., pp. 237, 238), while permitting other real estate, otherwise owned, to escape such burdens.

THOMAS L. CLARKE,
FREDERIC D. MCKENNEY,
Attorneys for Plaintiff in Error.

WAYNE MACVEAGH,
JOHN A. HENDERSON,
Of Counsel.